SUPREME COURT, U.S.
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No. 92-1530

In The

Supreme Court of the United States

October Term, 1992

600 WEST 115TH STREET CORP.,

Petitioner,

-against-

ROBERT VON GUTFELD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have authority to overrule the decision of a State's Highest Court regarding a State Consititutional decision, where that decision invokes the right of free speech and the right to petition the government for redress of grievance?

2. Can the Highest Court in a State "abuse it's discretion" when interpreting that State's own Constitution?

TABLE OF CONTENTS

	Page
Questions Presented For Review	*i*
Table of Contents to Brief	*ii*
Table of Contents to Appendix	*iii*
Table of Authorities	*iv*
Statement of Facts	1
Argument	
Point I	
Since The New York Court of Appeals Decided This Case Under a State as Well as Federal Analysis And Found That Under Either No Cause of Action Lies, This Court Does Not Have Jurisdiction to Grant Certiorari	2
Point II	
New York's Constitution, Ordinances And Regulations Support The Result in This Case	3
Conclusion	5

Page

APPENDIX CONTENTS

APPENDIX A

New York State Constitution, Article I § 8 ..... 1a

APPENDIX B

New York State Constitution, Article I § 9(1) ... 2a

APPENDIX C

New York City Charter, Chapter 8, Section 197-c 3a

APPENDIX D

New York City Charter, Chapter 27, Section 668 ..... 10a

TABLE OF AUTHORITIES

Page

CASES CITED:

600 West 115th Street Corp. v. Robert Von Gutfeld, 80 NY 2d 130 (1992), 589 NYS 2d 825 (1991)... 1

Gertz v. Robert Welch, Inc., 418 US 323 (1974) 3

Immuno AG v. J. Moor-Janowski, 77 NY 2d 235 (1991), 566 NYS 2d 971 2

Michigan v. Long, 463 US 1032 2

Milkovich v. Lorain Journal Co., 497 US ___, 111 L Ed 2d 1, 110 S. Ct. 2695 (1990) 2, 3

People v. Kruger, 452 NYS 2d 78 (2d Dept., 1982) 5

Starburst Realty Corp. v. City of New York, 132 Misc. 2d 878, 505 NYS 2d 796 (Sup. Ct., N.Y. Co., 1986) 5

STATUTES, REGULATIONS, ORDINANCES AND CONSTITUTIONAL PROVISIONS CITED:

New York Constitution Article I, Section 8 ..... 2, 3

New York Constitution Article I, Section 9 3

Page

STATUTES, REGULATIONS, ORDINANCES AND CONSTITUTIONAL PROVISIONS CITED: (continued)

New York City Consumer Affairs Regulation 1.0 ... 3, 4

New York City Charter, Chapter 8, Section 197-c ... 3, 4, 5

New York City Charter, Chapter 27, Section 668 .. 3, 4, 5

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STATEMENT OF FACTS

We do not necessarily agree with the statements made by the petitioner but are satisfied with the factual statements set forth by the New York Court of Appeals below, 80 NY 2d 130, 589 NYS 2d 825 (1992).

ARGUMENT

Point I

Since The New York Court of Appeals Decided This Case Under a State as Well as Federal Analysis And Found That Under Either No Cause of Action Lies, This Court Does Not Have Jurisdiction to Grant Certiorari.

Petitioner would have this Court grant certiorari where the Court below clearly held:

> ". . . this court perceives the protection afforded by the First Amendment of the United States Constitution and that afforded by Article I, Section 8 of the New York Constitution to be quite different. Our analysis of defendant's claims under the two documents, therefore, is made separately following an examination of the governing concerns in this area. As in *Immuno*, we analyze first the Federal provision, resolving the issue according to our understanding of the holding in *Milkovich v. Lorain Journal Co.* (497 US 1, 111 L.Ed.2d 1), and then examine defendant's rights under the State Constitution. *Our determination that the order must be reversed rests on our conclusion that defendant's statements cannot be construed to allege facts under either analysis.* (see, *Michigan v. Long*, 463 US 1032) A.8 - emphasis added.

As this Court stated in *Milkovich, supra*, and as has always been the meaning given to freedom of speech and the right to petition the government for redress of grievances dating back to the framers of the constitution, (A.45):

> "The fifty states, 'so long as they do not impose liability without fault . . . may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual . . ." (*Gertz v. Robert Welch, Inc.*, 418 US 323, 347 (1974), and *Milkovich v. Lorain Journal Co., supra*, at 2704).

New York, as interpreted by its highest court, has done just that, and, with due respect, this court cannot disturb it.

Point II

New York's Constitution, Ordinances And Regulations Support The Result in This Case.

There are 5 New York Provisions that apply herein.

New York Constitution Article I, Section 8;

New York Constitution Article I, Section 9;

New York City Consumer Affairs Regulation 1.0;

New York City Charter, Chapter 8, Section 197-c;

> New York City Charter, Chapter 27, Section 668.

Consumer Affairs Regulation 1.0 provides in pertinent part as follows:

> "Every application for a license must be accompanied by the following:
>
> (a) the written and duly acknowledged consent of the owner of the property in front of which the sidewalk cafe is to be operated.

Contrary to petitioner's position, they never submitted an affidavit of consent from the real owner of the sidewalk (the Condo Board) but rather submitted an affidavit of consent purportedly from a commercial condominium at 2937 Broadway. There is no such entity in existence. 2937 Broadway was merely a *unit* owner with no greater rights than any other individual unit owner and therefore any affidavit of consent from such party was meaningless, and when commented upon by respondent it was a proper issue for the hearing.

2937 Broadway certainly had no authority over the condo's common elements such as the sidewalk.

With respect to Section 197-c *et seq.* and Chapter 27 of the New York City Charter, they govern the role of Community Boards as part of the legislative land-use decision making process.

Under Section 197-c *et seq.* and Chapter 27 of the New York City Charter, Community Boards "play an important role and exercise specific statutory functions in connection with land use decision." *People v. Kruger*, 87 A.D. 2d 473, 452 NYS 2d 78, 79 (2d Dept. 1982).

They conduct the initial review of proposals for the use, development or improvement of property, including conducting public hearings and issuing recommendations, *id*, and play an important role in the City's "legislative process." *Starburst Realty Corp. v. City of New York*, 132 Misc. 2d 878, 505 NYS 2d 796, 798 (Sup. Ct., N.Y. Co. 1986).

CONCLUSION

For these reasons, the writ of certiorari petitioned for should be denied.

Dated: New York, New York
April 7, 1993

Respectfully submitted,
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Appendix A - New York State Constitution, Article I § 8

§ 8. [Freedom of speech and press; criminal prosecutions for libel]

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Appendix B - New York State Constitution, Article I § 9(1)

§ 9. [Right to assemble and petition; judicial divorces; gambling, except pari-mutuel, prohibited]

1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe amd except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

Appendix C - New York City Charter, Chapter 8 § 197-c [Pages 3a - 9a]

§ 197-c. **Uniform land use review procedure.** a. Except as otherwise provided in this charter, applications by any person or agency for changes, approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to city regulation shall be reviewed pursuant to a uniform review procedure in the following categories:

(1) Changes in the city map pursuant to section one hundred ninety-eight and section one hundred ninety-nine;

(2) Maps of subdivisions or plattings of land into streets, avenues or public places pursuant to section two hundred two;

(3) Designations of zoning districts under the zoning resolution, including conversion from one land use to another land use, pursuant to sections two hundred and two hundred one;

(4) Special permits within the jurisdiction of the city planning commission under the zoning resolution, pursuant to sections two hundred and two hundred one;

(5) Site selection for capital projects pursuant to section two hundred eighteen;

(6) Revocable consents pursuant to section three hundred sixty-four, requests for proposals and other solicitations for franchises pursuant to section three hundred sixty-three, and major concessions as defined pursuant to section three hundred seventy-four.

(7) Improvements in real property the costs of which are payable other than by the city pursuant to section two hundred twenty;

(8) Housing and urban renewal plans and projects pursuant to city, state and federal housing laws;

(9) Sanitary or waterfront land-fills pursuant to applicable charter provisions or other provisions of law;

(10) Sale, lease (other than the lease of office space), exchange, or other disposition of the real property of the city, including the sale or lease of land under water pursuant to section sixteen hundred two, chapter fifteen, and other applicable provisions of law;

(11) Acquisition by the city of real property (other than the acquisition of office space for office use or a building for office use), including acquisition by purchase, condemnation, exchange or lease and including the acquisition of land under water pursuant to section sixteen hundred two, chapter fifteen, and other applicable provisions of law; and

(12) Such other matters involving the use, development or improvement of property as are proposed by the city planning commission and enacted by the council pursuant to local law.

b. The following documents shall be filed with the department of city planning: (1) applications under this section, (2) any amendments thereto that are made prior to approval of such applications pursuant to this chapter, (3) any written information submitted by an applicant for purposes of determining whether an environmental impact statement will be required by law, and (4) documents or records intended to define or substantially redefine the overall scope of issues to be addressed in any draft environmental impact statement required by law. The department of city planning shall forward a copy of any materials it receives pursuant to this subdivision (whether or not such materials have been certified as complete) within five days to each affected borough president, community board or borough board.

c. The department of city planning shall be responsible for certifying that applications pursuant to subdivision a of this section are complete and ready to proceed through the uniform land use review procedure provided for in this section. Upon certification of an application, the department shall give notice of such certification to the council. If an application under this section has not been certified within six months after filing, both the applicant and, if the land use proposed in an application is consistent with the land use policy or strategic policy statement of the affected borough president, the affected borough president shall have the right at any time thereafter to appeal to the city planning commission for certification. The commission shall promptly, but in any event within sixty days of the filing of such an appeal, either certify the application or state in writing what further information is necessary to complete the application. If such an appeal is brought by an affected borough president, the affirmative vote of five members of the commission shall be sufficient to certify the application.

d. If a meeting involving a city agency and an applicant is convened to define or substantially redefine the overall scope of issues to be addressed in any draft environmental impact statement required by law for an application subject to review under this section, each affected community board and each affected borough president shall receive advance notice of such meeting, and each shall have the right to send one representative to the meeting.

e. Each affected community board shall, not later than sixty days after receipt of an application that has been certified pursuant to subdivision c of this section.

(1) notify the public of the application in a manner specified by the city planning commission pursuant to

subdivision i of this section, and

(2) either (a) conduct a public hearing thereon and prepare and submit a written recommendation directly to the city planning commission and to the affected borough president or (b) where authorized by this charter, submit a written waiver of the right to conduct a public hearing and to submit such written recommendations to the commission and the affected borough president.

f. A copy of a recommendation or waiver by a community board pursuant to subdivision e of this section that involves land located within two or more community districts in a borough shall also be filed with the affected borough board within the same time period as specified in subdivision e. Not later than thirty days after the filing of a recommendation or waiver with the borough board by all affected community boards, or, if any affected community board shall fail to act, thirty days after the expiration of the time allowed for such community board to act, the borough board may hold a public hearing on the application and any such recommendations and submit a written recommendation or waiver thereof to the city planning commission.

g. Not later than thirty days after the filing of a recommendation or waiver with the borough president by all affected community boards, or, if any affected community board shall fail to act, thirty days after the expiration of the time allowed for such community board to act, the borough president shall submit a written recommendation or waiver thereof to the city planning commission.

h. Not later than sixty days after expiration of time allowed for the filing of a recommendation or waiver within the city planning commission by a borough president, the commission shall approve, approve with modifications, or

disapprove the application. Any such approval or approval with modifications of the commission shall require the affirmative vote of at least seven of the members, except that the affirmative vote of nine members shall be required to approve or approve with modifications an application pursuant to paragraph five, ten or eleven of subdivision a of this section relating to a new city facility if the affected borough president recommends against approval of such application pursuant to subdivision g of this section and has proposed an alternative location in the same borough for such new city facility pursuant to subdivision f or g of section two hundred four. The commission shall conduct a public hearing on all applications that are subject to review and approval by the commission pursuant to this section prior to taking any action pursuant to any subdivision on a matter involving the siting of a capital project, the sale, lease, exchange or other disposition or acquisition of real property, a request for a proposal or other solicitation for a franchise or a revocable consent, the city planning commission may obtain a report from the office of management and budget or the department of general services, as appropriate. Any action of the city planning commission which modifies or disapproves a written recommendation of the community board, borough president or borough board shall be accompanied by a written explanation of its reason for such action.

i. The city planning commission shall establish rules providing (1) guidelines, minimum standards, and procedural requirements for community boards, borough presidents, borough boards and the commission in the exercise of their duties and responsibilities pursuant to this section, (2) minimum standards for certification of applications pursuant

to subdivision c of this section, and (3) specific time periods for review of applications pursuant to this section prior to certification.

j. If a community board, borough president or borough board fails or waives its right to act within the time limits for review pursuant to subdivisions e, f and g of this section, the application shall be referred to the next level of review. If the city planning commission fails to act on an application within the time limit specified in subdivision h of this section, the application shall be deemed to have been denied unless the application (i) is pursuant to paragraph three or four of subdivision a of this section, in which case the application may be forwarded to the council for review pursuant to the provisions of subdivision b of section two hundred, if applicable, or (ii) is pursuant to paragraph eight of subdivision a of this section, in which case the application shall be referred to the council for review and action as provided by state law.

k. Notice of any hearing on an application by the city planning commission shall be published in the City Record at least ten days immediately prior to the date of the hearing, and a copy of the notice shall be mailed to all community boards or borough boards affected by the application.

l. The commission shall establish by rule procedures for advance posting of notices of commission hearings on applications. Such notices shall be posted at the location of the land involved in such manner and with respect to such types of applications as the commission deems appropriate. Failure to post any such notice shall not affect or impair the validity of any decision of the city planning commission, the council or other agency or official pursuant to this chapter.

[New York City Charter, Chapter 8 § 197-c]

m. A community or borough board may review an application which is subject to the uniform land use review procedure pursuant to this section but does not involve land so located as to require reference to such board for review, if in the board's judgment the application might significantly affect the welfare of the community district or borough served by such board. In such a case the application and the related materials submitted to the affected board or boards by the city planning department shall be submitted also to such board upon the request of such board, and such board may hold its own public hearing thereon if it so desires and may submit its own written recommendations in regard thereto to the city planning commission for consideration at any time before the city planning commission takes action thereon.

Appendix D - New York City Charter, Chapter 27 § 668 [Pages 10a - 12a]

§ 668. **Variances and special permits.** a. Community boards and borough boards shall review applications to vary the zoning resolution and applications for special permits within the jurisdiction of the board of standards, and appeals under the zoning resolution pursuant to the following procedures:

1. Each proposal or application shall be filed with the board of standards and appeals, which shall forward a copy within five days to the community board for each community district in which the land involved, or any part thereof, is located, and to the borough board if the proposal or application involves land located in two or more districts in a borough.

2. Each such community board shall, not later than sixty days after the receipt of the proposal or application, either notify the public of the proposal or application, in the manner specified by the city planing commission pursuant to subdivision i of section one hundred ninety-seven-c, conduct a public hearing thereon and prepare and submit a written recommendation thereon directly to the board of standards and appeals, or waive the conduct of such public hearing and the preparation of such written recommendation.

3. A copy of a recommendation or waiver by a community board pursuant to paragraph two of this subdivision that involves land located within two or more community districts in a borough shall also be filed with the borough board within the same time period specified in that paragraph. Not later than thirty days after the filing of such a recommendation or waiver with the borough board by every community board in which the land involved is

located or after the expiration of the time allowed for such community boards to act, the borough board may hold a public hearing on the proposal or application and any such recommendation and may submit a written recommendation or a waiver thereof to the board of standards and appeals.

4. The receipt of such a recommendation or waiver from every community or borough board involved, or the expiration of the time allowed for such boards to act, shall constitute an authorization to the board of standards and appeals to review the application and to make a decision.

5. If after the receipt of such a recommendation or waiver from every community or borough board involved, or the expiration of the time allowed for such boards to act, the applicant for a special permit or variance submits to the board of standards and appeals any additional documents or plans, he or she shall at the same time forward copies of such documents or plans to the city planning commission, the council member involved and to the community or borough board involved.

6. Copies of any written information submitted by an applicant for purposes of determining whether an environmental impact statement will be required by law in connection with an application under this section, and any documents or records intended to define or substantially redefine the overall scope of issues to be addressed in any such draft environmental impact statement shall be delivered to all affected community boards and borough boards.

7. If a meeting involving a city agency and an applicant is convened to define or substantially redefine the overall scope of issues to be addressed in any draft environmental impact statement required by law for an application subject to review under this section, each community board involved and each borough president

involved shall receive advance notice of such meeting, and each shall have the right to send one representative to the meeting.

b. The recommendation of a community board or borough board pursuant to subdivision a of this section shall be filed with the board of standards and appeals and a copy sent to the city planning commission. The board of standards and appeals shall conduct a public hearing and act on the proposed application. A decision of the board shall indicate whether each of the specific requirements of the zoning resolution for the granting of variances has been met and shall include findings of fact with regard to each such requirement.

c. Copies of a decision of the board of standards and appeals and copies of any recommendation of the affected community board or borough board shall be filed with the city planning commission. Copies of the decision shall also be filed with the affected community or borough boards.

d. Any decision of the board of standards and appeals pursuant to this section may be reviewed as provided by law.

e. The city planning commission shall be a party to any proceeding to determine and vary the application of the zoning resolution. The commission may appear and be heard on any application pursuant to this section before the board of standards and appeals if, in the judgment of the city planning commission, the granting of relief requested in such application would violate the requirements of the zoning resolution relating to the granting of variances. The commission shall have standing to challenge the granting or denial of a variance in a proceeding brought pursuant to article seventy-eight of the civil practice law and rules, or in any similar proceeding.